Supreme Court, U.S.
FILED
JAN 2 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-493

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, PATRICK R. LEON, DENNIS PFROMMER, STARLING ROBERTS, JR., DOMINIC M. SKINNER, and CHRIS YOUNG,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' BRIEF IN REPLY TO THE BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

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INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioners David O. Conger *et alia* file this brief in reply to the brief of the National Labor Relations Board ("NLRB").

ARGUMENT

The NLRB's brief in opposition consists of mere question-begging and assertions of constitutionally unbridled administrative power that highlight the need for this Court to grant the petition.

I. The NLRB first contends that the District Court properly dismissed this case because "Congress intended to preclude direct judicial review of representation determinations" under the National Labor Relations Act ("NLRA"), and "to permit indirect review of such determinations" only in circumstances other than those that obtained in this case .[1] Even if correct in abstract principle, this argument has no practical application here. For petitioners seek to compel no substantive judicial "review" of the NLRB's decision as to the "accretion" *sub judice*, but only to vindicate their own procedural right to participate as parties in the process through which that decision is made in the first instance. Protection of this *ex ante* procedural right is perfectly consistent with preclusion of any *ex post* judicial "review" of the ultimate decision that derives from the process.

II. The NLRB then pretends that, in denying petitioners a right to any procedural protections in the "accretion", "there has been no violation of any statutory mandate".[2] This is arrogant nonsense.

A. The NLRB acknowledges that its full and only competence to hear "accretion" cases derives from the "express authority" in NLRA Sections 9(b) and 9(c)(1) authorizing it to determine appropriate bargaining units for purposes of exclusive representation.[3] However, it then claims that the "statutory

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[1] NLRB Brief at 6-7.

[2] *Id.* at 7.

[3] *Id.* at 5-6.

mandate" in Section 9(c)(1)—explicitly requiring notice and hearing where there is "reasonable cause to believe that a question of representation affecting commerce exists"—does not control in the "accretion" context, not because of another statutory provision, but because the NLRB's administrative rule for "unit clarification" applies "only where the [NLRB] finds that a question of representation does *not* exist".[4] Thus, the NLRB purports, through a mere rule, to define out of existence the very "statutory mandate" that even it concedes is necessary to legitimate—and *ex necessitate* circumscribes the ambit of—that rule!

B. Equally vapid is the NLRB's further claim that, notwithstanding the unequivocal language of NLRA Section 9(c)(1), it may proceed as it has in "accretion" cases, under the aegis of Section 9(b) alone, because that section empowers it "to define appropriate units, and * * * has no hearing requirement".[5] The NLRB does not explain why the limited power to "define" a unit —in the typical case, as a prerequisite to affording employees the opportunity to vote on whether they wish to be represented in that unit by some union—implies the unrestricted power to compel employees to accept such representation in an "accretion" case without *any* procedural protections at all.[6] But the absence of such an explanation is no accident. For the structure and purpose of the statute justify no such implication.

The definition of a unit under NLRA Section 9(b) is an administrative conclusion of fact and law as to which the personal

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[4] *Id.* at 7-8, 6 (emphasis in original), *citing* 29 C.F.R. §§ 101.17, 102.60(b).

[5] *Id.* at 8 (footnote omitted).

[6] If the NLRB's statutory power to "define" a unit suffices in *any* situation to permit it to promulgate an administrative rule whereby employees may be subordinated to an exclusive representative without *any* process whatsoever, why need the NLRB conduct elections among employees under any circumstances? That is, if the NLRB's interpretation of NLRA Section 9(b) is correct, then Section 9(c)(1) is superfluous.

views of the affected employees are largely irrelevant: the NLRB must determine whether the purposes of the NLRA will be served by affording employees of a particular type, in a particular industrial setting, an opportunity to accept, or to reject, union representation. The definition of a bargaining unit reflects the NLRB's supposedly "expert" judgment that union representation in that unit, under those conditions, would be consistent with the purposes of the NLRA—*if the employees themselves later choose such representation*. The mere definition of the unit by the NLRB, however, does not subsume, control, foreordain, or even purport to predict that choice by the employees themselves.

For that reason, the alleged absence in Section 9(b) of the statute of procedural protections for the employees at the preliminary and largely contingent stage of unit-definition (if such absence there is) proves nothing about whether there are or must be procedural protections for the employees at the critical operative stage of selection or acceptance of union representation *vel non*, either as a matter of Section 9(c)(1) of the statute itself or as a matter of supervening constitutional requirement.

C. Finally, the NLRB's argument also gratuitously assumes the legitimacy of its notion that "accretion" cases involve *no* question concerning representation. Self-evidently, whatever its arguable cogency with respect to the union and the employer (which already accept the existence of a bargaining unit subject to exclusive representation), this perspective is palpably false with respect to nonunion employees, such as petitioners, who are the involuntary subjects of "accretions". For the whole purpose of an "accretion" is to submit those employees to control by some union the representation of which, through formal membership or otherwise, they never sought and would otherwise never accept.

III. The NLRB's position on the constitutional merits of this case is equally invalid.

A. The NLRB first impugns petitioners as "contend[ing] that the imposition of a union representative without notice,

hearing, *and an opportunity to vote* results in a deprivation of their constitutional rights".[7] But petitioners have never asserted, and do not now assert, the italicized portion of this contention. Rather, petitioners contend that, because the exclusive-representation scheme of the NLRA infringes on their constitutional right to contract autonomously for employment, that scheme may not be applied to them absent *some form* of notice and hearing that meets procedural-due-process standards. In the case of an original selection of an exclusive representative, which is *not* at issue here, the NLRA provides notice and hearing through an election in which all employees have an opportunity to vote. In the case of an "accretion", which *is* the subject of the instant litigation, the requisite notice and hearing need not take the form of an election—but must nevertheless provide *some* meaningful opportunity for the affected employees (such as petitioners here) to participate in the NLRB's decision-making process, such as through the filing of briefs and presentation of arguments at a hearing on the issue.[8]

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[7] NLRB Brief at 8 (emphasis supplied).

[8] Thus, the NLRB is doubly wrong to claim that "the logical premise of petitioners' argument" is that "any employee who is newly hired or transferred into a bargaining unit position must be afforded an opportunity to participate in a representation election". NLRB Brief at 11 n.10. *First*, a "newly hired or transferred" employee has, before his hiring or transfer, *no* constitutional right as against the employer to a "union-free" environment. Rather, he must take his employment as he finds it; and if he himself *voluntarily* accepts the job or the transfer, he has no basis for complaint because he ends up subject to an exclusive representative. Where, as here, an "accretion" is involved, distinguishably, an "accreted" employee is *involuntarily* included *by the NLRB* within a *pre*-existing bargaining unit, often (again, as here) with a concomitant loss of *pre*-existing employment benefits. In the first case, the newly hired or transferred individual freely accepts a job to which he had no *pre*-existent right, which job happens to exist in a unionized environment. In the second case, an individual who already has a job (and, therefore, *pre*-existent contractual rights) in a nonunionized environment is forced by a governmental agency to accept union-representation as a condition of keeping that job. Obviously, any lack of procedural due process is irrelevant in the former case, because there can be no deprivation of a constitutional right through an individual's acceptance of a job to which he had

B. The plain fact is that the NLRB has provided petitioners *no* notice and hearing whatsoever, and brazenly admits as much, saying that

- its "accretion" doctrine "effectively works to deny the accreted employees a right to vote on their choice of bargaining representative";
- "[e]mployees do not have a right [under the NLRB's rules] to a hearing in accretion cases";
- "no statutory review procedure exists allowing an employee to appeal a[n NLRB] representation proceeding";
- "[t]his procedure is unfair to everyone"; and
- petitioners "do not have any due process rights which could have been violated".[9]

The NLRB rationalizes this result by arguing that, although "the liberty interest protected by the Fifth Amendment may include a right of the individual to contract in appropriate circumstances", petitioners' right to contract autonomously "is 'not an absolute right,' but one which may be restricted by

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no *pre*-existent right. *Second*, even in the latter case, the *type* of procedural due process required need not be an actual election. If, as here, only an "accretion" is involved, the process need include no more than notice and an opportunity for the affected employees to participate in an NLRB hearing. Insofar as the NLRB will conduct a hearing anyway, on the petition of the employer or the union, the added participation by the "accreted" employees constitutes no significant burden to anyone—and certainly cannot "fundamentally undercut the statutory purpose of promoting industrial stability", as the NLRB disingenuously claims to fear. *See* NLRB Brief at 11 n.10.

[9] Appendix to Petition at 44a-45a, 49a n.12, 50a, 50a n.13.

government 'in the public interest.'"[10] Although true as an abstract principle, this statement does not answer the question posed by the instant petition as to whether, in the "circumstances" of an "accretion", any "restrict[ion]" of this "liberty interest protected by the Fifth Amendment" must afford the affected employees at least minimal procedural due process. But the answer to this question is self-evident: *no* "liberty interest protected by the Fifth Amendment"—"absolute" or "*non*-absolute"—may be "restricted by government", even "in the public interest", without appropriate procedural due process.[11]

Here, the NLRB has repeatedly admitted that its "accretion" doctrine provides affected employees *no* procedural due process of *any* kind. Therefore, the NLRB's position is justifiable only if petitioners' "liberty interest protected by the Fifth Amendment" can be "restricted"—or, more descriptively put, annihilated altogether—*without* such process.

C. To the resolution of this issue, cases dealing with "the principle of collective bargaining through an exclusive representative selected by a majority of the bargaining unit"[12] are not helpful. For these cases assume *sub silentio* that an exclusive representative has been properly selected, and address only the authority of the representative *vis-a-vis* the employees thereafter.

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[10] NLRB Brief at 9.

[11] The NLRB's fixation on the "*non*-absolute" nature of petitioners' right is childish. If a right is "absolute", government may not constitutionally restrict it, in any way, no matter what procedure is employed. The entire corpus of this Court's procedural-due-process case-law, therefore, necessarily involves "*non*-absolute" rights the "restrict[ion]" of which by government nevertheless requires appropriate procedures. Thus, to say that a right is "not absolute" merely frames the further inquiry as to what procedure is requisite for the "restrict[ion]" of that right "in the public interest". It certainly does not follow that, because a right is "not absolute", therefore that right may be obliterated without any procedural due process at all, as the NLRB contends here.

[12] NLRB Brief at 9-10.

No case cited by the NLRB holds that any employee may be subordinated to an exclusive representative, for any reason, without *any* modicum of procedural due process.

Thus, the controlling case here remains *Consolidated Edison Co. v. NLRB*.[13] The NLRB pretends that *Consolidated Edison* does not apply, because (supposedly) "petitioners [here] have no judicially cognizable interest of which they are being deprived".[14] But, when this assertion is measured by the NLRB's frank admission that "the liberty interest protected by the Fifth Amendment may include a right of the individual to contract in appropriate circumstances",[15] the NLRB's pretense collapses under the weight of the self-contradiction.[16]

IV. The NLRB's attempt to salvage the District Court's *sua sponte* dismissal of petitioners' duty-of-fair-representation claims against Local 199 also fails. On the one hand, the NLRB argues that, "prior to [its] clarification of the unit to include petitioners, they were not members of that unit and hence the Union owed them no duty".[17] Yet, on the other hand, the NLRB properly explains the "theory of unit clarification" as presuming that, "because of their functional similarity to positions within the existing unit, new or substantially altered positions are appropriately included in an existing unit and the employees occupying those positions are properly governed by the larger, existing

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[13] 305 U.S. 197 (1938).

[14] NLRB Brief at 8 n.5.

[15] *Id.* at 9.

[16] In addition, *Consolidated Edison* is evidence that petitioners' claims are cognizable even if the so-called "exception" of *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), does not apply. *See* NLRB Brief at 8 n.6.

[17] NLRB Brief at 12.

group's choice of bargaining representative".[18] The juxtaposition of these statements frames—but hardly answers—the question of whether, under the "theory of unit clarification", the union must be presumed to owe "accreted" employees such as petitioners some minimal procedural-due-process duty of fair representation when it seeks to assert against them the "existing group's choice of bargaining representative", by which "choice" the union is, in fact (if not by formal NLRB decree), *already* the "accreted" employees' representative in a functional sense.

In any event, the NLRB's view that Local 199 had no duty to provide petitioners with notice of the NLRB's "accretion" hearing emphasizes why the NLRB itself had that duty. For, on the view expressed here by the NLRB, no one had that duty, and, as a result, petitioners were deprived of their rights with no notice at all. The question to be answered here thus remains: Can such a *procedureless* deprivation occur without violating the statute or the Constitution?

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[18] *Id.* at 6 n.4.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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January 2, 1991